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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974
No. 74-1361

VICTOR FELIX MAGANA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner of violations of the laws of the United States, to wit, violation of Title 21 U.S.C. Sections

841(a)(1) and 846--conspiracy to distribute heroin and the distribution of heroin. The petitioner has been sentenced to be confined for an indeterminate term pursuant to the provisions of Title 18 U.S.C. Section 5010(b).

The petitioner is presently out on bail pending the determination of this petition.

1. OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISIONS SUSTAINING JURISDICTION

The jurisdiction of the Court rests on Section 1254(1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. 3231.

The Judgment of the Court of Appeals was entered on February 12, 1975. Petitioner's petition for rehearing and suggestion for rehearing en banc was denied April 1, 1975. (See Appendix B.)

3. QUESTIONS PRESENTED AND HOW RAISED

The constitutional question raised by petitioner concerns the Fourth Amendment.

Were petitioner's rights under the Fourth Amendment violated when the United States District Court refused to exclude evidence obtained by police officers who had driven onto a driveway within the curtilage of petitioner's residence without having probable cause to believe that the petitioner had committed a crime and without having probable cause to justify a search.

It is respectfully submitted that the decision of the United States Court of Appeals for the Ninth Circuit in the within matter is in direct contradiction to the decisions of this Court in Katz v.

United States, 389 U.S. 347 and Hester v. United States, 265 U.S. 57 and is also in conflict with the decisions of other Circuit Courts--Rosencrantz v. United States, 356 F.2d 310 (First Circuit); Walker v. United States, 255 F.2d 447 (Fifth Circuit); United States v. Potts, 297 F.2d 68 (Sixth Circuit); Care v. United States, 231 F.2d 22 (Tenth Circuit); and Fullbright v. United States, 392 F.2d (Tenth Circuit).

4. STATEMENT OF THE CASE

On October 24, 1973, the Federal Grand Jury for the Central District of California handed down a Five Count Indictment (No. 13357) charging the petitioner and Raudel Bugarin with, inter alia, conspiracy to distribute heroin and the distribution of heroin. (C.T. 1-6).

The petitioner was arraigned on October 29, 1973, and entered a plea of not guilty to all charges.

A Hearing on Motions to Suppress Evidence brought by both defendants was held

and the Motions denied on December 12, 1973.

The petitioner waived his right to trial by jury and a Court trial commenced on December 13, 1973.

On December 18, 1973, the petitioner was found guilty on Counts One, Three, Four and Five and sentencing was set down for January 15, 1974. On that date, the Court determined the petitioner to be eligible for treatment under the Federal Youth Corrections Act as a young adult offender and ordered him to be committed to the custody of the Attorney General for imprisonment pursuant to Title 18 U.S.C. Section 5010(b). The Court further directed that the petitioner be subject to a special parole term of three years to commence after the expiration of the sentence theretofore imposed.

The petitioner filed his Notice of Appeal on that same day and is presently out on bond pending the determination of this petition.

5. FACTS

The pertinent testimony given at the motion to suppress was as follows:

1. Officer Larry M. Davenport of the Los Angeles Police Department was the first witness for the prosecution and he testified as follows:

On October 12, 1973, the co-defendant Bugarin and a man named Gianetti offered to sell an informant eight ounces of heroin (R.T. 9, 10, 11). The informant related the offer to Davenport who was operating in an undercover capacity for the Los Angeles Police Department (R.T. 10). The police commenced surveillance of Gianetti's residence, 616 Lexington Avenue in the City of Glendale, at 9:30 A.M., on October 13, 1973. (R.T. 11, 12). Shortly thereafter Davenport received notification that Bugarin had arrived at the Lexington Avenue location; he skin-searched the informant, searched his automobile, gave him money with which to purchase heroin, and sent him to Gianetti's residence. (R.T. 14).

Subsequently, Bugarin was observed to leave Gianetti's house and drive to 10942 Hulme Street in the City of Lynwood (R.T. 14).

Bugarin entered the Hulme Street address for a short period of time, after which he stood and talked to a person later identified as the petitioner, in the front yard of that address, for approximately ten minutes (R.T. 14). Bugarin then drove back to the Gianetti residence where he gave the informant two small chunks of material (R.T. 16). The informant left Gianetti's home and met Davenport on the street corner. There, he gave Davenport the chunks and the officer performed a chemical test which showed them to be heroin (R.T. 16).

The informant told Davenport that Bugarin had instructed him to go home and that Bugarin would telephone him at 1:15 P.M. (R.T. 16). When Bugarin did telephone, he told the informant and Davenport to proceed to 6131 Sycamore Street to "do the deal". (R.T. 17). The informant went into the Sycamore Street address where he

met Bugarin. Bugarin told him that he and Davenport should follow him in their automobile to another address (R.T. 17). This was agreed to and the officer and the informant followed Bugarin's automobile to a location one block west of 10942 Hulme Street (R.T. 17).

The two cars parked and Bugarin informed Davenport that he was going to his cousin's house "to see if everything was cool". (R.T. 18). Davenport did not observe Bugarin walk into the residence although he saw him walk in its direction. (R.T. 18). Five minutes later, Bugarin returned and told Davenport "everything is cool. He's got it. Let's do it." (R.T. 18).

Davenport insisted that the informant make certain that heroin was present before paying any money. (R.T. 18). Bugarin responded, "I want you to trust me. We do lots of big deals. You don't have to worry." (R.T. 18). Bugarin and the informant walked towards the Hulme Street address and Davenport drove around the block. As he came abreast of the

10942 address, he observed Bugarin and the informant in front of the residence on the grassy area. (R.T. 19). The two appeared to be moving towards the north side of the residence at which point there was a driveway. (R.T. 22).

Davenport stated that the driveway started at the Street and went back to a garage at the rear of the residence. ibid He further testified that he did not notice the garage as he drove by the residence. ibid. The driveway ran approximately sixty feet and was located right next to the 10942 Hulme Street residence. (R.T. 23). Davenport continued down the Street and parked on "Imperial facing westbound". ibid.

Approximately five minutes thereafter the informant and Bugarin came out to Davenport's car and the informant stated "I have seen it". Davenport stated "how was it packaged" and the informant said "it was in two rubbers." ibid. Davenport then opened the trunk of his automobile, and began to count money that was in a package. He then blew his nose which, he testified, was a "prearranged

arrest signal" (R.T. 23). Thereupon police officers responded to the signal by arresting and handcuffing Bugarin, Davenport and the informant. (R.T. 24).

2. The second witness for the prosecution was Sergeant Charles Ripley of the Los Angeles Police Department. He testified that he and Officer Joseph Stanley had surveilled the Hulme Street address since noon on October 13th and were present about one block away when they saw Officer Davenport blow his nose (R.T. 39). His purpose at being at the Hulme Street address was to insure Officer Davenport's safety while he was engaged in the undercover buy and to surveil the location. If the elements of a crime were observed by either Sergeant Baxter who was in charge of the investigation, or Officer Davenport he and Stanley were to act upon the information related to them. (R.T. 38).

He testified that Davenport's blowing of his nose "meant to me that he had received an offer to sell heroin from the person, Mr. Bugarin, or that he had

heroin at that time that had been furnished." (R.T. 40, 41).

Upon viewing the signal, he and Officer Stanley drove into the driveway which was on the north side of the premises and proceeded to drive up the driveway towards the rear of the location. (R.T. 42). It appeared to Ripley that the activity in question was centered about this area "when these people had gone and come from there." (R.T. 42). The area was not visible to him from his surveillance location. (R.T. 42).

After driving approximately twenty feet down the driveway, Officer Ripley observed the petitioner who, according to his testimony, was standing near the driver's door of a white Mercury Comet automobile, inside the garage which was located behind the house (R.T. 22, 23, 56). Ripley stopped the car between ten and twenty feet from the garage door and he and Stanley dressed in plain clothes alighted from their vehicle. Although petitioner made no furtive movements, and although officers had never seen

the petitioner before, guns were drawn. Officer Ripley stated that he displayed his badge and informed the petitioner that he was a police officer conducting a narcotics investigation. (R.T. 57).

Ripley testified that the petitioner responded by throwing an object to the ground outside of the garage with his right hand. (R.T. 43). Ripley retrieved the object which proved to be a bundle of masking tape and tissue papers which, according to Ripley, smelled like heroin. (R.T. 44).

Ripley then went into the garage after the petitioner had been arrested and discovered two condoms containing a substance resembling heroin which was lying on a stool some eight feet inside the garage. (R.T. 46). Ripley first testified that it was only after walking into the garage area and searching that he had discovered the condoms, but later he testified that he had actually observed the condoms while standing at the garage entrance. (R.T. 46, 60).

Thereafter Ripley notified Sergeant Baxter as to what had taken place and gave him the objects he had seized. (R.T. 48).

3. Officer Joseph Stanley testified that he was with Sergeant Ripley on October 13, 1973, and that they both drove into the driveway of the Magana residence upon the receipt of the "pre-arranged signal" given by Davenport. He supported the police testimony that the petitioner was seen to throw some object at the time they began to exit their vehicle while on the petitioner's premises. (R.T. 311). He testified that upon exiting his vehicle he had stated "police officers. You are under arrest." (R.T. 317).

After argument, the trial Court denied petitioner's motion to suppress ruling that the entry into the driveway by Officers Stanley and Ripley did not violate the petitioner's Fourth Amendment rights.

After the denial of petitioner's motion to suppress, petitioner waived the right to trial by jury and after an abbreviated court trial was found guilty on all counts. Essentially, the only evidence produced against the petitioner consisted of the fruits of what is contended to be the unlawful entry onto the petitioner's premises.

6. ARGUMENT

Petitioner contends that the trial Court erred in denying the motion to suppress the evidence illegally seized at or about the premises at 10942 Hulme Street. Petitioner contended at the trial level and before the Court of Appeals that the approach of Officers Stanley and Ripley onto the curtilage of petitioner's residence, without warrant or probable cause, constituted an illegal search in violation of the Fourth Amendment of the United States Constitution, and that the evidence seized was therefore tainted and inadmissible.

In upholding the validity of the officers' entry onto the driveway area, the Court of Appeals stated that

> "a driveway is only a semi-private area. The expectation of privacy which a possessor of land may reasonably have while carrying on activities on his driveway will generally depend upon the nature of the activities and the degree of visibility from the street...the test in each case should be that of reasonableness, both of the possessor's expectations of privacy and of the officers' reasons for being on the driveway.

Here, the officers were providing security for their fellows who were known to be effecting the arrest of a narcotics dealer engaged in business in the residence of which the driveway formed a part. The act of the officers

in turning into the driveway at the time and under the circumstances of this case was reasonable. Magana's privacy was not unreasonably invaded when the officers entered his driveway and then saw him throw something away. United States vs. Capps, 435 F.2d 637 (Ninth Circuit, 1970)." (See pp. 3 & 4 of the Court's Opinion, Appendix A, emphasis supplied.)

As is clearly indicated in the statement of facts, which sets forth the police version of the events in question, the Court of Appeals inadvertently misstated the facts when it concluded that at the time of their entry onto the Magana driveway

> "the officers were providing security for their fellows who were known to be effecting the arrest of a narcotics dealer engaged in business in the residence of which the driveway formed a part." (pp. 3 & 4 Opinion).

First of all, at the time Officers Ripley and Stanley drove up the driveway, no "arrest of a narcotics dealer engaged in business in the residence" was being effected. The testimony of all officers called as witnesses and questioned on this point reveals that Bugarin had already been arrested and handcuffed (along with Dunne and Davenport) by the time Ripley and Stanley arrived at the residence. Secondly, there is no ambiguity in the testimony as to the location of these arrests; they occurred adjacent to Officer Davenport's car, which was parked not on Hulme Street, but on Imperial, around the corner. It is significant to note that the Government in its brief, never contended that the testimony given at the suppression hearing led to the inference that Officers Ripley and Stanley were assisting in the arrest of Bugarin or the protection of Davenport. The Government conceded in its Statement of Facts that

> [Ripley] later explained that the surveilling officers were to 'approach the premises,

identify themselves and conduct an investigation.' (R.T. 53). Upon seeing the signal, Officer Ripley 'drove into the driveway... and proceeded to drive up the driveway towards the rear of the location...' (Appellee's Brief, p. 10, emphasis added).

Thus, under its own test, it is respectfully suggested that if the Court of Appeals had correctly stated the facts, it would have found for the petitioner since it would have necessarily concluded that the officers in fact had no sufficient reason for being on the driveway. It is apparent that the Court's Opinion was based almost entirely upon its finding that the officers had gone onto the driveway for the purpose of "providing security for their fellows who were known to be effecting the arrest of a narcotics dealer engaged in business in the residence of which the driveway formed a part". (pp. 3 & 4 Opinion).

Nonetheless, when Petitioner moved the Ninth Circuit Court of Appeals for a petition for rehearing and suggestion for rehearing en banc on the basis of the critical misstatement of facts, the Court denied petitioner's motion.

Petitioner herein renews his contention that the critical misstatement of facts contained in the Opinion below justifies a reversal of the Judgment even under what is contended to be the Court's erroneous analysis of the law with respect to petitioner's "reasonable expectation to privacy".

It is respectfully contended that by its decision in this case, the Ninth Circuit Court of Appeals has for the first time set up a new category which it calls "semi-private" areas which it deems to be not covered by the dictates of the Fourth Amendment although it concedes that:

1. A person in that area has a reasonable expectation of privacy as that concept has been described in Katz vs. United States, supra, and

2. the area is within the curtilage of the premises deemed protected by the Fourth Amendment in decisions of numerous other Circuit Courts. [See Rosencrantz vs. United States, 356 F.2d 310 (First Circuit); Walker vs. United States, 255 F.2d 447 (Fifth Circuit); United States vs. Potts, 297 F.2d 68 (Sixth Circuit); Care vs. United States, 231 F.2d 22 (Tenth Circuit); and Fullbright vs. United States, 392 F.2d 432 (Tenth Circuit).]

The Opinion below seems to take the position which has been refuted so often by this Court and by other Circuit Courts that the determination of whether a place or person's privacy is protected by the Fourth Amendment is governed by the reasonableness of the acts undertaken by law enforcement officers. It is respectfully argued that this Court in Katz v. United States, supra, and in so many other

cases, has clearly set forth the proposition that it is the expectation of privacy alone which governs the places and things which are to be protected by the Fourth Amendment and that once those areas are determined to be protected, law enforcement officers must have probable cause to arrest or to conduct a search before they can intrude upon those protected areas.

Accordingly, petitioner contends that this case should be controlled by the rules set forth in Katz v. United States, supra and Hester v. United States, supra, in that the officers' intrusion onto the residence driveway constituted an invasion into what the petitioner sought to preserve as private being within the curtilage of his home and that he had a "reasonable expectation of privacy" therein which was violated by said intrusion, requiring the suppression of all of the evidence introduced against the petitioner at his trial and a reversal of the Judgment.

7. REASONS FOR GRANTING WRIT

The constitutional question raised by the petitioner concerns the Fourth Amendment. As indicated previously, it is petitioner's contention that the Ninth Circuit Court of Appeals committed error of constitutional dimension when it ruled that the area protected by the Fourth Amendment is not determined by an individual's expectation of privacy but by a test balancing the expectation of privacy against the reasonableness of the act of law enforcement officers.

Petitioner contends that the lower Court's action violated petitioner's rights under the Fourth Amendment and further contends that the Ninth Circuit decision in this matter is in direct contradiction to decisions of this Court in Katz v. United States, supra, and Hester v. United States, supra. Moreover, it is contended that the Ninth Circuit decision herein presents a question directed to the Court's supervision of the United States District Courts and Courts of Appeal because of a conflict

between the Ninth Circuit Opinion and opinions of the First, Fifth, Sixth, and Tenth Circuits.

8. CONCLUSION

For the reasons given, Certiorai should be granted and the Judgment should be reversed.

Respectfully submitted,
ALVIN S. MICHAELSON

Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. VICTOR F. MAGANA, *Appellant.*	No. 74-1635 OPINION

[February 12, 1975]

Appeal from the United States District Court for the Central District of California.

Before: MERRILL and GOODWIN, Circuit Judges, and WOLLENBERG,* District Judge.

GOODWIN, Circuit Judge:

Victor F. Magana challenges the district court's refusal to suppress the evidence which led to his conviction under 21 U.S.C. §§ 841(a)(1) and 846.

On October 12, 1973, Officer Davenport of the Los Angeles Police Department received a tip from a reliable informant that two of his acquaintances (Bugarin and Gianetti) were prepared to sell Davenport eight ounces of heroin. The transaction was expected to take place the next afternoon.

Davenport and the informant met Bugarin near a residence at 10942 Hulme Street, Lynwood, California. Bugarin and the informant entered the house, and shortly thereafter returned to Davenport's car. The informant told Davenport that he had seen the heroin. Acting satisfied with the pending purchase, Davenport went to the trunk of his car, pretending to get the money to pay

*The Honorable Albert C. Wollenberg, United States District Judge for the Northern District of California, sitting by designation.

for the heroin. Davenport blew his nose, a prearranged signal to police officers hidden nearby. The officers came out of hiding and arrested Davenport, Bugarin, and the informant.

Two other officers (Ripley and Stanley) had established a stakeout near the residence. Their mission was to await the arrival of the undercover team and ensure Davenport's safety. When Davenport signaled, Ripley and Stanley drove into the driveway of the Hulme Street residence, where they saw a man (Magana) standing in the open garage. As the officers continued driving, Magana walked to the open garage door. Officer Ripley testified that he showed Magana his badge, and then saw Magana throw something down. Officer Stanley arrested Magana. After Stanley had arrested Magana, Ripley went into the adjacent garage and saw two condoms containing heroin. (The heroin was in plain view to one standing in the driveway near the garage, but Ripley said he discovered it only after he had entered the garage.)

Prior to Davenport's signal, Ripley had seen Magana come from the front door of the house and walk down the driveway toward the garage. Ripley knew after the signal that an illegal transaction was in progress. Ripley did not know whether additional contraband or participants in the heroin scheme remained at the Hulme Street location. However, Ripley did have probable cause to believe that Bugarin had an uncaught partner in crime (Gianetti), even though the officers did not say they thought Magana was Gianetti. The officers did not know whether Magana was connected with Bugarin; they knew only that Magana was at a suspicious place at a suspicious time.

With the foregoing facts before him, Ripley had probable cause, after he was in the Hulme Street driveway, and after he saw Magana throw something away, to believe that Magana was one of the men the officers were seeking in connection with the heroin transaction just completed. If Ripley and Stanley were lawfully in the driveway, then the arrest of Magana without a warrant was lawful, and the evidence which flowed from that arrest was not vulnerable to Magana's motion to suppress.

We turn then to the question, whether, on these facts, police officers have the right to drive into a private driveway to see whatever is there to be seen and to be in a position to follow up

their investigation with an arrest, a search, and a seizure of evidence if further facts unfold.

The government contends that Magana's driveway is not protected by the Fourth Amendment. In *United States v. Bustamante-Gamez*, 488 F.2d 4 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974), discussing the validity of a search originating with an entry upon a driveway, this court stated:

> "It is by no means certain that the entry upon the driveway was contrary to the Fourth Amendment, even though there were no warrant or exceptional circumstances excusing failure to obtain one. The driveway may not have been such a place as to support a reasonable expectation of privacy on the part of the defendants * * *. However, for reasons that will appear, we need not and do not decide this question." 488 F.2d at 7-8.

The question deferred in *Bustamante-Gamez* is before us again. The driveway where Magana was arrested was within the curtilage of the house Magana was using, but "a reasonable expectation of privacy," and not common-law property distinctions, now controls the scope of the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347 (1967).

The proper inquiry is whether the officers' intrusion into the residential driveway constituted an invasion into "what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public * * *." *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968).

A driveway is only a semiprivate area. The expectation of privacy which a possessor of land may reasonably have while carrying on activities on his driveway will generally depend upon the nature of the activities and the degree of visibility from the street. It would be equally unwise to hold, as a matter of law, that all driveways are protected by the Fourth Amendment from all penetrations by police officers as to hold that no driveway is ever protected from police incursions. The test in each case should be that of reasonableness both of the possessor's expectations of privacy and of the officers' reasons for being on the driveway.

Here, the officers were providing security for their fellows who were known to be effecting the arrest of a narcotics dealer en-

gaged in business in the residence of which the driveway formed a part. The act of the officers in turning into the driveway at the time and under the circumstances of this case was reasonable. Magana's privacy was not unreasonably invaded when the officers entered his driveway and then saw him throw something away. *United States v. Capps,* 435 F.2d 637 (9th Cir. 1970).

Magana has argued that his motion to suppress is governed by *United States v. Connolly,* 479 F.2d 930 (9th Cir.), *cert. dismissed,* 414 U.S 897 (1973). In *Connolly,* agents knew that drugs had been removed from the premises in question not long before they arrived. But they did not know who might be inside, how long those persons may have been there, or what relationship they might have to an already arrested defendant. All that the agents knew in *Connolly* was that some contraband probably remained on the premises. In holding that a desire to make an arrest was no justification for the intrusion into the house, we stated that "[e]ven certain knowledge that contraband is within a dwelling does not constitute probable cause to arrest whoever happens to be inside • • •." 479 F.2d at 936. But the occupants were arrested inside their house after the officers broke in.

Here, the arrest did not involve intrusion into the house, and the narcotics in Magana's garage were in plain view. We hold that the seizure of the narcotics was an incident to a lawful arrest. When the officers saw Magana throw something away, at or near the scene of a narcotics arrest then in progress, they could assume that the man they were about to arrest was party to the illegal activity and if not detained might destroy or conceal other evidence.

Because Magana's arrest was legal, the motion to suppress the evidence seized in connection therewith was correctly denied.

Magana has advanced other arguments asserting infirmity in his consent to a further search and produced additional evidence used against him, but the district court found that the evidence seized was seized pursuant to a consent voluntarily given. The finding was supported by the record.

Affirmed.

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APPENDIX-B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. VICTOR F. MAGANA, Appellant.	)	No. 74-1635 ORDER

Before: MERRILL and GOODWIN, Circuit Judges, and WOLLENBERG,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing, and Judges Merrill and Goodwin have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

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*The Honorable Albert C. Wollenberg, United States District Judge for the Northern District of California, sitting by designation.

The petition for rehearing is denied, and the suggextion for a rehearing en banc is rejected.

FILED April 1, 1975
Clerk
United States Court of
Appeals